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August 10, 1987

Larry C. Batson, Esquire
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Department of Corrections
P. O. Box 21787
Columbia, South Carolina 29221-1787

Dear Larry:

In a letter to this Office you referenced a provision in the general appropriations act of 1987, Act No. 170 of 1987, which provides in Section 55.8:

(u)pon initiation by the South Carolina Department of Corrections, and upon prior approval by the Budget and Control Board, the Department of Corrections may contract for any and all services, but such services must (1) demonstrate reasonably comparable, cost-effectiveness to traditional methods of construction, (2) result in long-term operational cost-savings, (3) result in the provision of a new facility of sufficient bed, program, and support space more expeditiously than traditional methods, and (4) be subject to the year-to-year appropriation process of the General Assembly and state procurement procedures.

In an opinion dated August 8, 1985 this Office considered the question of the authority of a private corporation to participate in the management of a State correctional facility pursuant to a contract with the State Board of Corrections. You have inquired on behalf of a member of the Board of Corrections whether in light of such provision this Office would continue to suggest as outlined in the August 8, 1985 opinion the develop-

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ment of a case or controversy whereby a court could by a declaratory judgment action review any proposed plan of operation concerning such a correctional facility.


In the opinion, this Office indicated that the issue of a private corporation participating in the management of a State correctional facility pursuant to a contract with the Department of Corrections was a "novel" question. However, it was our conclusion that no State constitutional provision or statute absolutely prohibited such a contract so long as "state officials maintain adequate supervision and control." See, Miss. Atty. Gen. Op., June 30, 1986. In reaching such conclusion the provisions of Article XII, Section 9 were particularly addressed. Also, it was indicated that pursuant to Section 24-3-30 of the Code, the State Board of Corrections is granted broad authority with regard to the placement of prisoners. Therefore, it would appear that the Board has the statutory authority to contract with a private company with regard to the placement of prisoners. However, the opinion stressed that express statutory clarification was advisable. Obviously, the provisions of Section 55.8 of Act No. 170 of 1987 are in keeping with such clarification.

The opinion also stressed that this Office was unaware of any case directly commenting on the idea of private corporations assisting in the operation of prisons. But generally, see, Medina v. O'Neill, 589 F.Supp. 1028 (S.D. Tex. 1984) [private security facility conduct constituted "state action"]; Ky. Assoc. for Retarded Citizens v. Conn., 510 F.Supp. 1233, 1250 (W.D. Ky. 1980); Milonas v. Williams, 691 F.2d 931, 939-40 (10th Cir. 1982); 1986 Op. (Inf.) Atty. Gen. Alas. 25 (July 8, 1986). As a result, we suggested that before large expenditures of public funds are made, buildings constructed, and contracts let, a court review any final plan of operation and the specifics of any contract. See, Miss. Atty. Gen.'s Op., June 30, 1986; "Breaking the Code of Deference: Judicial Review of Private Prisons", 96 Yale L. J. 787 (1987). Of course, as referenced in the opinion, no comment was being provided as to the ability or the appropriate procedure to develop the posture of a case or controversy. Even though the provisions in Section 55.8 of Act No. 170 of 1987 do clarify the authority of the Board of Corrections to contract with a private company as to the placement of prisoners, it remains our suggestion that court review be sought.

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If there is anything further, please advise.

Sincerely,


Robert D. Cook
Executive Assistant for Opinions

RDC/an